#35/appeal
brief
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10-29-03

3663

**PATENT**
Docket No. 2779.2.2

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

| | | |
|---|---|---|
| Applicant: | David R. Montague | ) |
| | | ) |
| Serial No.: | 09/488,079 | ) |
| | | ) Art Unit: |
| Filed: | January 20, 2000 | ) 3622 |
| | | ) |
| For: | COMPUTER-READABLE MEDIUM PRODUCT LABEL APPARATUS AND METHOD | ) ) ) |
| | | ) |
| Examiner: | James W. Myhre | ) |

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### APPEAL BRIEF

OCT 2 7 2003

Commissioner for Patents
P.O. Box 1450
Alexandria, VA, 22313

Sir:

Noted
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for brief

Applicant respectfully appeals the rejection of the claims of the above-identified patent application and requests reconsideration of the claims in view of the following remarks.

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## I. REAL PARTY IN INTEREST

E-TAGZ, L.L.C. (hereinafter "Appellant") is the Real Party in Interest as the sole owner of the new technology embodied in the above-identified patent application. Inventor David R. Montague assigned all rights, title, and interest to the above-identified patent application to E-TAGZ, L.L.C.

## II. RELATED APPEALS AND INTERFERENCES

To the knowledge of Appellant and his legal counsel, there are no pending appeals or interferences that will directly effect or will be directly affected by or have a bearing on the Board's decision in the pending appeal.

## III. STATUS OF CLAIMS

Claims 1-28 are currently in the case.

Claims 1, 2, 5-12, 15-19, 22, and 24-28 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Dlugos Sr. et al. (U.S. Pat. No. 5,153,842) (hereinafter "Dlugos").

Claims 3, 4, 13, 14, 20, 21, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Dlugos.

The rejections of claims 1-28 are charted in Table 1 attached as part of the Appendix.

## IV. STATUS OF AMENDMENTS

Appellant filed an amendment to the claims of the above-identified patent application on June 3, 2003. The amendment was entered and there have been no subsequent amendments to the claims. In response to the June 3, 2003 amendment, the examiner mailed the final rejection from which Appellant appeals.

## V. SUMMARY OF THE INVENTION

In certain embodiments, the present invention may provide a product label or tag 60, 410 coupled to a computer-readable medium. (See Figure 5 and page 35, lines 7-15.) The label 60, 410 may be formed to display information 484. The information 484 may include facts about the product or the product's source. Information 484 may be conveyed directly through the use of printed words, symbols, trademarks, service marks, pictures, and the like. The information 484 may also be conveyed through the selection of the color or shape of the label 60, 410. (See Figures 3,4, & 10 and page 34, lines 2-14.)

In one embodiment, the computer-readable medium may include an optical medium such as a CD-ROM 460 or DVD 468. In other embodiments, the computer-readable medium may include a magnetic medium such as a magnetic strip 464 or floppy disk 470. (See Figure 10 and page 35, lines1-3.) Software available on the computer-readable medium product label 60, 410 may include a launcher, browser, viewer, e-mail, facsimile sender, player, or other executables as well as vendor data. (See page 3, line 21 through page 4, line 1.)

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The computer-readable medium product label 60, 410 may be configured to be attached to a variety of products 412 including clothing, toys, footgear, machinery, headgear, foodstuffs, furniture, appliances, sporting goods, dry goods, tools, and plants. The label 60, 410 may be configured to be attached to the product 412 or the product packaging 492. The label 60, 410 may be attached to the product 412 in a manner to protect the label 60, 410 from damage during shipping. (See Figures 11-17 and page 4, lines 6-10.)

## VI.  ISSUES

Whether claims 1, 2, 5-12, 15-19, 22, and 24-28 are patentable under 35 U.S.C. § 102(b) over Dlugos.

Whether claims 3, 4, 13, 14, 20, 21, and 23 are patentable under 35 U.S.C. § 103(a) over Dlugos.

## VII.  GROUPING OF CLAIMS

With respect to whether claims 1, 2, 5-12, 15-19, 22, and 24-28 are patentable under 35 U.S.C. § 102(b), Appellant submits that claim 1 should be selected as the representative claim.

With respect to whether claims 3, 4, 13, 14, 20, 21, and 23 are patentable under 35 U.S.C. § 103(a), Appellant submits that claim 3 should be selected as the representative claim.

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## VIII.  ARGUMENT

### Claim Rejections Under 35 U.S.C. § 102(b)

With respect to representative claim 1, it is well established that for a prior art

reference to anticipate, every element of the claimed invention must be identically disclosed

in a single prior art reference; and those elements must be arranged or connected together in a

single reference in the same way as specified in the patent claim. *Carella v. Starlight*

*Archery & Pro Line*, 804 F.2d 135, 138 (Fed. Cir. 1986). Dlugos does not disclose a

computer readable medium storing instructions executable by a computer of a purchaser.

Thus, a rejection of anticipation by Dlugos is improper and should be withdrawn.

In rejecting claim 1, the examiner admits that Dlugos does not explicitly disclose

Appellant's claimed invention. The examiner asserts anticipation based on inherent

characteristics. The examiner reasons "since Dlugos discloses that the instructions are

executed on one or more computers (e.g. shipper's computer) that it is inherent that they

would also be executable on the purchaser's computer."

Without addressing what may or may not be inherent, Appellant disagrees with the

examiner's primary assertion that "...Dlugos discloses that the instructions are executed on

one or more computers (e.g. the shipper's computer)...." In making this assertion, the

examiner cites Dlugos column 3, lines 39-42, which reads:

> "Microprocessor 100 is connected to memory 104. Memory 104 is shown in
> more detail in FIG. 9 and advantageously comprises read only memory (ROM)
> 130 *for storing operating software for label 2.*" (Emphasis added.)

Microprocessor 100, memory 104, and ROM 130 are all part of Dlugos' label. (See Dlugos

Figure 2.) As stated by Dlugos, the operating software stored in the label is for the label.

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That is, the operating software stored in the label is executed by a processor within the label itself. Nowhere does Dlugos disclose operating software stored in the label being executed by a shipper's computer (or any other computer) as asserted by the examiner. Thus, Dlugos does not support the scope of disclosure attributed thereto by the examiner.

Moreover, nowhere in Dlugos is there any disclosure of hardware or software that would permit another computer to execute *instructions* stored in connection with Dlugos' label. Rather, Appellant finds that Dlugos intends to "provide a more convenient form in which to transport *information*" and to "provide a more convenient form in which to store *information*." (See Dlugos, column 2, lines 22-27, emphasis added.) Perhaps Dlugos most clearly defines his invention when he states that his label is to accompany an "order to its destination, with *information* read from the label and additional *information* written into the label at various stages along the way." (See Dlugos column 8, lines 30-42, emphasis added.)

A label that supports storage of *information* read therefrom or written thereto does not anticipate a label coupled with *instructions* executable by another computer. This is true even if the information is read or written to the label by a computer. Information and instructions are two fundamentally different things in computer science. A computer may be able to collect, store, display, and organize information communicated thereto by Dlugos' label, *but a computer cannot execute information* communicated thereto. To execute means "to perform indicated tasks according to encoded instructions." *Merriam Webster Dictionary* <http://www.m-w.com/cgi-din/dictionary> (accessed Oct. 16, 2003). "In programming, execution implies loading the machine language code of the program into memory and then performing the instructions." *Microsoft Press Computer Dictionary* 154 (2nd ed., Microsoft

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Press 1994). Appellant finds no disclosure in Dlugos of a label coupled to a computer readable medium storing instructions executable by a computer of a purchaser, as required by Appellant's claim 1.

The failure of Dlugos to anticipate Appellant's claim 1 has been recognized by the supervisor of the present examiner. In a telephonic interview conducted October 21, 2003, Eric W. Stamber, a Supervisory Patent Examiner, acknowledged to Appellant that Dlugos did not anticipate Appellant's claim 1. Appellant's claim 1 has not been amended since Mr. Stamber deemed it novel over Dlugos. In his summary of the interview, Mr. Stamber wrote:

> "Current claim language distinguishes over the prior art listed above which does not show a label communicating first info. of the product and source of the product in combination with a computer executable medium as claimed."

(See Interview Summary included in Appendix.)

Dlugos was "listed above" in the Interview Summary and was considered by Mr. Stamber before he came to the above-quoted conclusion.

## Claim Rejections Under 35 U.S.C. § 103(a)

Claims 3, 4, 13, 14, 20, 21, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Dlugos.

The Manual of Patent Examining Procedure § 2143 recites the well established doctrine that, to establish a prima facie case of obviousness, three basic criteria must be met:

(1)    there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the references or combine the reference teachings;

(2)    there must be a reasonable expectation of success; and

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(3)    the prior art reference (or references when combined) must teach or
suggest all of the claim limitations.

With respect to representative claim 3, Dlugos fails to teach or suggest all of the claim

limitations. Additionally, there is no suggestion or motivation, either in Dlugos or in the

knowledge generally available to one of ordinary skill in the art, to modify Dlugos to obtain

Appellant's claimed invention. Thus, a rejection under 35 U.S.C. § 103(a) over Dlugos is

improper.

As discussed hereinabove, Dlugos fails to teach or suggest a label coupled to a

computer readable medium storing instructions executable by a computer of a purchaser.

Rather, Dlugos teaches a label accompanying an "order to its destination, with *information*

read from the label and additional *information* written into the label at various stages along

the way." (See Dlugos column 8, lines 30-42, emphasis added.) A label that supports

storage of *information* read therefrom or written thereto does not render obvious a label

coupled with *instructions* executable by a purchaser's computer. As emphasized

hereinabove, information and instructions are two fundamentally different things in computer

science. A computer can execute instructions, but it cannot execute information. The two

are not interchangeable.

Furthermore, Dlugos provides no suggestion or motivation to provide executables to

another computer foreign to the embedded processor of the label. Nowhere in Dlugos is

there any suggestion of hardware or software that would permit another computer to execute

*instructions* stored in connection with Dlugos' label. Dlugos does not suggest structure or

function to transfer software and execute it on a purchaser's computer. Rather, Dlugos

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teaches against access to, or transfer of, executable instructions by teaching two independent computers (*i.e.* label processor and shipper's computer) that can perform exactly as desired (pre-programed) without sharing executables.

Moreover, Dlugos does not suggest or motivate coupling a label's identifying information (*e.g.* trademark or tradedress colors, shapes, images, words, etc.) to a computer readable medium containing executable instructions directed to the computer of a purchaser.

The examiner has failed to provide any additional reference or observation to remedy the deficiency of Dlugos' teachings and suggestions with respect to Appellant's claimed invention. Thus, the rejection of claim 3 is improper and should be withdrawn.

In view of the foregoing, Appellant asserts that Dlugos neither anticipates nor renders obvious Appellant's claimed invention. Accordingly, Appellant respectfully requests that the rejections of claims 1-28 be withdrawn and that claims 1-28 be allowed.

DATED this 27th day of October, 2003.

Respectfully submitted,
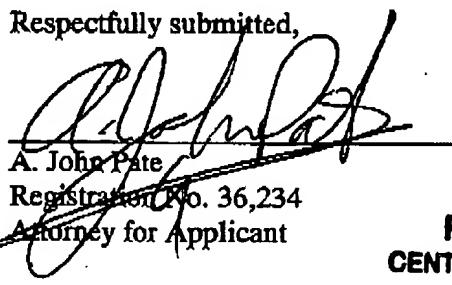
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## IX. APPENDIX

### TABLE 1

| Claim | 35 USC § 102(b) as anticipated by Dlugos | 35 USC § 103(a), in view of Dlugos |
|---|---|---|
| 1 | ✔ | |
| 2 | ✔ | |
| 3 | | ✔ |
| 4 | | ✔ |
| 5 | ✔ | |
| 6 | ✔ | |
| 7 | ✔ | |
| 8 | ✔ | |
| 9 | ✔ | |
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| 21 | | ✔ |
| 22 | ✔ | |
| 23 | | ✔ |
| 24 | ✔ | |
| 25 | ✔ | |
| 26 | ✔ | |
| 27 | ✔ | |
| 28 | ✔ | |

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## Claims as They Currently Stand

1. (previously amended) An apparatus comprising:

a label configured to be affixed to a product at a source thereof;

the product having a surface associated therewith;

the label configured to directly communicate first information corresponding to at least one of the product and a source of the product; and

a computer readable medium, storing instructions executable by a computer of a purchaser of the product, coupled to the product by the label.

2. (original) The apparatus of claim 1, wherein the first information is printed on the label.

3. (original) The apparatus of claim 2, wherein the first information is contained in a selection of color on the label.

4. (previously amended) The apparatus of claim 1, wherein the label is shaped to provide the first information through a trademark symbol corresponding to at least one of the product and the source of the product.

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5. (original) The apparatus of claim 1, wherein the computer-readable medium contains second information comprising at least one of product facts, source facts, new product facts, service facts, a game, a data gathering interface, a test, a browser, a launcher, and a network identifier corresponding to a location of additional information.

6. (original) The apparatus of claim 1, wherein the product includes at least one of a garment, footwear, headgear, a toy, a foodstuff, furniture, an appliance, sporting goods, dry goods, a tool and a plant.

7. (original) The apparatus of claim 6, wherein the product is placed with respect to the label to protect the label prior to purchase.

8. (original) The apparatus of claim 1, wherein the label includes at least one of a hang tag and a hanging tag, substantially enclosing a computer-readable medium.

9. (original) The apparatus of claim 1, wherein the computer-readable medium includes at least one of a printed medium, an electromagnetic medium, an optical medium, and a firmware medium.

10. (original) The apparatus of claim 9, wherein the computer-readable medium is formatted in at least one of the formats including compact disk, floppy disk, digital video disk, magnetic strip, bar code, symbolic code, and an embedded chip.

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11. (previously amended)  An apparatus comprising:

a label configured to be affixed to packaging substantially enclosing a product at a source thereof, and the packaging having an exterior;

the label configured to directly communicate first information corresponding to at least one of the product and a source of the product;

the packaging substantially enclosing the product; and

a computer-readable medium coupled to the packaging by the label and containing instructions executable on a computer of a user.

12. (original)  The apparatus of claim 11, wherein the first information is printed on the label.

13. (original)  The apparatus of claim 12, wherein the first information is contained in a selection of color on the label.

14. (previously amended)  The apparatus of claim 11, wherein the label is shaped to provide the first information through a trademark symbol corresponding to at least one of the product and the source of the product.

15. (original) The apparatus of claim 11, wherein the computer-readable medium contains second information comprising at least one of product facts, source facts, new product facts, service facts, a game, a data gathering interface, a test, a browser, a launcher, and a network identifier corresponding to a location of additional information.

16. (original) The apparatus of claim 11, wherein the label includes at least one of a hang tag and a hanging tag, substantially enclosing the computer-readable medium.

17. (original) The apparatus of claim 11, wherein the computer-readable medium includes at least one of a printed medium, an electromagnetic medium, an optical medium, and a firmware medium.

18. (previously amended)  An apparatus comprising:

a label configured to be affixed to a product at a source thereof, the product having an exterior;

the label configured to be attached to a tether having a first end and a second end;

the first end configured to be coupled to the label;

the second end configured to be coupled to the exterior of the product, such that the tether couples the label to the exterior of the product;

the label configured to directly communicate first information corresponding to at least one of the product and a source of the product; and

a computer-readable medium coupled to the label and containing instructions executable on a computer of a user.

19. (original)  The apparatus of claim 18, wherein the first information is printed on the label.

20. (original)  The apparatus of claim 19, wherein the first information is contained in a selection of color on the label.

21. (previously amended)  The apparatus of claim 18, wherein the label is shaped to provide the first information through a shape trademark symbol corresponding to at least one of the product and the source of the product.

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22. (original)  The apparatus of claim 18, wherein the computer-readable medium contains second information comprising at least one of product facts, source facts, new product facts, service facts, a game, data gathering interface, a test, a browser, a launcher, and a network identifier corresponding to a location of additional information.

23. (original)  The apparatus of claim 18, wherein the product defines an opening to an interior of the product and at least part of the label is positioned in the interior of the product.

24. (previously amended) A method comprising:

configuring a label to directly communicate first information corresponding to at least one of a product and a source of the product;

coupling a computer-readable medium to the label, the computer readable medium containing instructions executable of a computer of a user of the product; and

coupling the label to an exterior of the product.

25. (original) The method of claim 24, wherein the product is packaged.

26. (original) The method of claim 24, wherein the label is coupled to the exterior of the product by a flexible member.

27. (previously presented) An apparatus comprising:

a label affixed to a product at a source thereof to be viewable by a prospective purchaser and located proximate an outer surface of at least one of the product and the product packaging at a point of sale;

the product having a surface associated therewith;

the label configured to directly communicate advertising information to a purchaser thereof, the advertising information corresponding to at least one of the product and a source of the product; and

a computer readable medium, storing at least one executable computer program independent from the product, and loadable and executable by a computer of a purchaser of the product, the medium being physically coupled to the product by a substrate of the label.

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28. (previously presented) An apparatus comprising:

a label configured to be affixed to a product at a source thereof to display at a point of sale;

the product having a surface associated therewith;

the label configured to directly communicate advertising information to a purchaser thereof, the advertising information corresponding to at least one of the product and a source of the product; and

a computer readable medium, storing instructions, independent from the product, executable by a computer of a purchaser of the product, physically coupled to the product by the label.

**Merriam-Webster**
**DICTIONARY**

11th Collegiate Dictionary     Encyclopædia Britannica

Dictionary     Thesaurus     Unabridged Dictionary

- Home
- Help
- Word of the Day
- Word Games
- Word for the Wise
- Books and CDs
- Online Education
- Company Info
- Customer Service
- Network Options
- Language Zone
- The Lighter Side
- Site Map

**Member Log-In**

One entry found for execute.

Main Entry: ex·e·cute 🔊
Pronunciation: 'ek-si-"kyüt
Function: *verb*
Inflected Form(s): -cut·ed; -cut·ing
Etymology: Middle English, from Middle French *executer*, back-formation from *execution*
Date: 14th century
*transitive senses*
**1** : to carry out fully : put completely into effect <*execute* a command>
**2** : to do what is provided or required by <*execute* a decree>
**3** : to put to death especially in compliance with a legal sentence
**4** : to make or produce (as a work of art) especially by carrying out a design
**5** : to perform what is required to give validity to <*execute* a deed>
**6** : PLAY <*execute* a piece of music>
*intransitive senses*
**1** : to perform properly or skillfully the fundamentals of a sport or of a particular play <never had a team *execute* better -- Bobby Knight>
**2** : to perform indicated tasks according to encoded instructions -- used of a computer program or routine
**synonym** see KILL, PERFORM
- ex·e·cut·able 🔊 /-"kyü-tə-bəl/ *adjective*

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execute _____ **E** _____ expansion board

**execute** To perform one or more instructions. In programming, *execution* implies loading the machine language code of the program into memory and then performing the instructions.

**execution time** Abbreviated E-time. The number of clock ticks (pulses of a computer's internal timer) that a microprocessor requires to decode and carry out an instruction after it has been fetched from memory. Execution time is the second half of an instruction cycle, the first half being fetch time. *See also* instruction time.

**executive** *See* operating system.

**executive information system** Abbreviated EIS. A set of tools designed to provide executives and managers with accurate, timely information about their organization and products. An EIS organizes data into categories and reports. Because its primary focus is information, an EIS differs from a decision support system (DSS), which is designed to help with analysis and decision making. *Compare* decision support system.

**exerciser** A program designed to exercise some piece of hardware or software by performing a large set of operations on it. For example, an exerciser for a graphics display might cycle through all possible graphics modes, drawing a large number of images and using a variety of palettes in each mode.

**exit** In a program, to return to the calling routine from the called routine. A routine often has one exit point—the end of the routine. The routine can, however, have several exit points in order to allow termination based on a variety of conditions.

**expanded** A font style supported in some applications that sets the characters farther apart than their normal spacing. *Compare* condensed.

**expanded memory** On IBM PCs and compatible computers, a type of physical memory, up to 8 megabytes (MB), that can be added to machines based on the Intel 8086/8088 microprocessor or to machines with 80286/80386/80486 microprocessors running MS-DOS in real (8086-emulation) mode. The use of expanded memory is defined by the Expanded Memory Specification (EMS). Because it represents memory that is not normally accessible to programs running under MS-DOS, expanded memory requires an interface called the Expanded Memory Manager (EMM), which maps pages (blocks) of bytes from expanded memory onto reserved areas called "page frames" in an accessible memory area. Only EMS-compatible software can make use of expanded memory. *See also* EEMS, EMS, Expanded Memory Manager.

**Expanded Memory Manager** Abbreviated EMM. A device driver that implements the software portion of the Expanded Memory Specification (EMS). Although EMS systems typically require additional hardware, managers written for the Intel 80386 and 80486 processors can use the advanced features of these chips to simulate EMS by using extended memory. *See also* EMS, expanded memory, extended memory.

**Expanded Memory Specification** *See* EMS.

**expansion** A means of increasing the capabilities of a microcomputer by adding hardware designed to perform a task that is not built into the basic system. *Expansion* is generally used in reference to the addition of printed circuit boards (expansion boards) that plug into openings (expansion slots) inside the body of the computer or to encased cards that plug into slots in the computer's housing. In personal computers designed as open-ended systems, these slots enable expansion boards and associated devices to connect with and transfer information on the computer's main data highway, the bus. Computers with expansion slots can be equipped with as many additional pieces of hardware as there are slots available. *See also* expansion slot, open architecture, PC Card, PCMCIA slot.

**expansion board** A circuit board that holds chips and other electronic components connected by conductive paths and that is plugged into a computer's bus (main data-transfer path) to add functions or resources to the computer. See the illustration. Typical expansion boards add memory, disk-drive controllers, video support, parallel and serial ports, and internal modems. The simple terms *board* and *card* are used interchangeably by most people to refer to all expansion boards. *See also* expansion slot.

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| *Interview Summary* | Application No.<br>07/488,079 | Applicant(s)<br>MONTAGUE | |
|---|---|---|---|
| | Examiner<br>TESFAMARIAM | Group Art Unit<br>3622 | |

All participants (applicant, applicant's representative, PTO personnel):

(1) _ERIC STAMBER (SPE)_       (3) _____

(2) _JACK PATE (APPLICANT'S REP.)_       (4) _____

Date of Interview   _10/21/02_

Type: ☒ Telephonic   ☐ Personal (copy is given to   ☐ applicant   ☐ applicant's representative).

Exhibit shown or demonstration conducted:   ☐ Yes   ☒ No. If yes, brief description:

_____

Agreement ☒ was reached.   ☐ was not reached.

Claim(s) discussed: _1, 11, 18_

Identification of prior art discussed:
_BARON ET AL., DLUGOS SR. ET AL_

Description of the general nature of what was agreed to if an agreement was reached, or any other comments:
_CURRENT CLAIM LANGUAGE DISTINGUISHES OVER PRIOR ART LISTED_
_ABOVE WHICH DOESN'T SHOW A LABEL COMMUNICATING FIRST INFO._
_OF THE PRODUCT + SOURCE OF THE PRODUCT IN COMBINATION WITH_
_A COMPUTER EXECUTABLE MEDIUM AS CLAIMED.  FURTHER SEARCH_
_IS NECESSARY AT THIS POINT, FINALITY WILL BE WITHDRAWN AND_
_NEW ACTION WILL FOLLOW SHORTLY._

(A fuller description, if necessary, and a copy of the amendments, if available, which the examiner agreed would render the claims allowable must be attached. Also, where no copy of the amendents which would render the claims allowable is available, a summary thereof must be attached.)

1. ☒ It is not necessary for applicant to provide a separate record of the substance of the interview.

Unless the paragraph above has been checked to indicate to the contrary, A FORMAL WRITTEN RESPONSE TO THE LAST OFFICE ACTION IS NOT WAIVED AND MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a response to the last Office action has already been filed, APPLICANT IS GIVEN ONE MONTH FROM THIS INTERVIEW DATE TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW.

2. ☐ Since the Examiner's interview summary above (including any attachments) reflects a complete response to each of the objections, rejections and requirements that may be present in the last Office action, and since the claims are now allowable, this completed form is considered to fulfill the response requirements of the last Office action. Applicant is not relieved from providing a separate record of the interview unless box 1 above is also checked.

*[signature]*
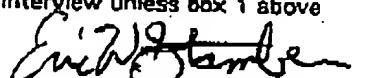
ERIC W. STAMBER
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600

Examiner Note: You must sign and stamp this form unless it is an attachment to a signed Office action.

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PTO-413 (Rev. 10-95)           Interview Summary           Paper No. _26_